

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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CS Docket No. 96-85

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In the Matter of  
Implementation of Section 207  
of the Telecommunications Act  
of 1996

Restrictions on Over-the-Air  
Reception Devices: Television  
Broadcast and Multichannel  
Multipoint Distribution Service

JOINT COMMENTS

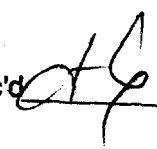
Submitted By

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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
Implementation of Section 207	)	
of the Telecommunications Act	)	
of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air	)	
Reception Devices: Television	)	
Broadcast and Multichannel	)	
Multipoint Distribution Service	)	

**JOINT COMMENTS**

CAI Wireless Systems, Inc., CS Wireless Systems, Inc. and Heartland Wireless Communications Inc. ("the Companies"), by their attorneys, hereby file comments to the Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> CAI and CS and Heartland are three of the largest wireless cable operators in the country providing wireless cable service using MMDS and ITFS frequencies to a total of approximately 260,000 subscribers throughout the United States. The Companies applaud the Commission for taking swift action to implement the Section 207 of the Telecommunications Act of 1996.<sup>2</sup>

**Background.** Wireless cable service is emerging as an important medium for providing competitive multi-channel video service. The Commission has recognized the great potential of wireless cable and has recently completed a marathon session of auctions to allocate Basic Trading Areas (BTAs) throughout the country. The wireless industry

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<sup>1</sup> CAI and Heartland are two of the largest publicly traded wireless cable companies in the country. CS is jointly owned by CAI and Heartland.

<sup>2</sup> Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (1996).

responded by bidding almost \$240,000,000 for the opportunity to provide an increased level of service and true competition to wired cable and DBS companies.<sup>3</sup> The industry is now poised to introduce digital compression technology that will enable the provision of 100-150 channels of programming. The stage is set for real competition. As the Congress has recognized, however, in order to achieve the great promise of wireless systems, operators are totally dependant on the ability to install reception facilities at the homes of potential subscribers. It is more than fortuitous that, at a time when the industry is about to enter the phase of its greatest expansion, the Congress has decreed that restrictive local regulations on the installation and placement of receiving antennas must be prohibited and has directed the Commission to adopt whatever regulations are necessary to accomplish the task.

Section 207 of the Telecommunications Act of 1996 states that "the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."<sup>4</sup> The Commission has proposed to comply with the new law by creating a rebuttable presumption

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<sup>3</sup> FCC Public Notice of March 29, 1996

<sup>4</sup> 1996 Act Sec. 207. It should be noted that the use of the words "multi-channel multipoint distribution service" is not precise. MMDS does not include use of ITFS or MDS frequencies. MDS, MMDS and ITFS frequencies are combined to provide wireless cable service. It was obviously not the intent of the Congress to limit the applicability of Section 207 to antennas that receive only MMDS frequencies. The Commission should clarify this in the final regulations adopted in this proceeding.

that any such local or state restriction is unreasonable and is therefore preempted. The presumption can be rebutted by a showing that the regulation in question is needed to fulfill a health or safety objective. In addition, a waiver process is proposed to weigh unique circumstances. With respect to covenants or homeowners' association rules the Commission has gone further and preempted antenna restrictions per se.

The rules proposed in this proceeding are nearly identical to those adopted in the similar proceeding designed to preempt regulations prohibiting satellite antennas. Indeed, a Further Notice of Rulemaking seeking to conform those rules to the requirements of Section 207 is outstanding.<sup>5</sup> The Companies submit that these regulations are unnecessarily cumbersome and do not adequately reflect the clear intent of the Congress. Regulations that restrict MMDS and TVBS antennas are intended to be prohibited. Creating a "presumption" that local regulations are unreasonable does not satisfy the Congressional intent and could lead to time-consuming and burdensome administrative and judicial litigation.

The Commission's Proposal Will Establish a New Bureaucracy. By creating a presumption, the Commission, in effect, has opened its doors to thousands of petitions for declaratory rulings seeking to rebut the presumption upon a showing that the local regulation is needed to fulfill a safety or health objective. Pleading cycles will be established. File numbers will be assigned. Tracking system will be devised. Speed of service reports will be

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<sup>5</sup> Report and Order and Further Notice of Proposed Rulemaking, FCC 96-78 (released March 11, 1996); 47 C.F.R. Sec. 25.104.

issued. In short, a new bureaucracy is being born. Emerging wireless cable companies will be burdened with time-consuming and expensive proceedings, which these start-up companies can ill afford as they attempt to establish a presence against huge, well established landline cable companies. Lost in all the paperwork will be the certainty that Congress so clearly intended, and that industry so desperately needs -- simply that restrictions on devices used to receive MMDS service should be prohibited.

It would appear from its proposals that the Commission contemplates a bifurcated system where local or state courts are also permitted to determine whether the Commission's presumption of unreasonableness has been rebutted. Thus, it seems that local authorities, fearing an adverse decision from the Commission, will be allowed to forum shop to have their arguments heard in a friendlier environment. Such a process, of course, will make it impossible to even know what arguments have succeeded in every hamlet far and wide, and will inevitably have the effect of neutralizing the Commission's rules entirely as local courts issue decisions that are inconsistent from jurisdiction to jurisdiction and largely favorable to the position of local authorities.

In addition to establishing rebuttable presumptions, the Commission has also created a process by which local authorities may obtain a waiver of the rules. Waivers are intended to deal not with regulations designed to protect the public health and safety, but with unique circumstances such as the preservation of "historic districts." Unfortunately, the Commission has provided no standards that might provide guidance to those seeking waivers. It can be

expected therefore, that there will be thousands of waiver requests, citing "unique" circumstances and creating the need for yet another processing line at the Commission, with more delay and more confusion.

The Commission Should Adopt a Simpler Approach. Congress wants the Commission to prohibit restrictions on the use of receiving antennas. The Companies respectfully submit that the Commission has proposed not so much a prohibition, but a process. The Companies urge the Commission to adopt a simpler approach. First, the law does not contemplate a rebuttable presumption, but rather a preemption. The Commission should take the same approach to local and state regulations as it proposes to take for the regulations of homeowners' associations -- restrictions on antenna use should be prohibited and regulations should be preempted per se. Having created a per se preemption, the Commission can then deal with the inevitable, but few, cases where some restriction on the use of antennas might appear justified.

Waivers Should be Few and Far Between. Even though the Congress has directed the Commission to adopt regulations within the public interest context of Section 303 of the Act, it is still clear that the vast majority of antenna restrictions are intended to be prohibited. The public interest factor is intended to be a safety valve, not a throughway. The Companies understand that the public interest may dictate that under extremely limited circumstances certain zoning regulations may be upheld. To deal with these limited circumstances the Companies suggest that the Commission establish a simple waiver procedure with specific

standards. The use of general concepts such as "waterfront property" or "environmentally sensitive areas" are simply not specific enough and are sure to result in an unnecessary number of waiver requests.<sup>6</sup> The waiver procedure should be designed to reduce the number of waiver requests by making it clear that waivers will not easily be granted. It seems obvious, for instance, that there are no "health" considerations that might reasonably prohibit the installation of an MMDS receiving antenna.<sup>7</sup> Nor, given the small size of these antennas (regardless of shape), would any safety concern justify setback restrictions such as contemplated by the Commission in the case of C-band satellite dishes. Surely, the masts used to support MMDS antennas can raise little concern. The size and shape of broadcast and MMDS antennas were known to the Congress when it adopted Section 207 and so it is not necessary for the Commission to take such matters into consideration anew in a waiver process. Furthermore, the number of waiver requests can be reduced by making it clear that only the least burdensome regulations will be considered. The Commission should also make it clear that local regulations that require permits, inspections and other administrative hurdles that are likely to impose unnecessary delay in the installation of MMDS antennas will be prohibited.

**Conclusion.** The Companies urge the Commission simply to prohibit local and state

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<sup>6</sup> It is not apparent what type of "waterfront" property the Commission contemplates or even why waterfront property should be entitled to waiver consideration at all. The phrase "environmentally sensitive areas" is similarly vague. It seems that by introducing these concepts, the Commission is opening the door to waiver requests based solely on aesthetic values and inviting a myriad of filings.

<sup>7</sup> The MMDS antennas in question only receive signals and do not emit RF energy.

restrictions on the use of MMDS antennas

and issue specific standards designed to minimize the instances in which waivers permitting the continued applicability of these restrictions will be contemplated. Wireless cable operators need not merely access to potential customers, but administrative certainty. The simpler the process, the greater the benefit to both the industry and the Commission alike. In addition, the Commission should abandon its proposal to permit local courts to determine the circumstances under which local restrictions may be upheld. There should be only one source for such determinations and that source must be the Commission.

The Companies stand ready to cooperate with the Commission's efforts to resolve this proceeding expeditiously. Should the Commission require further information, the Companies will be pleased to provide it.

Respectfully submitted,

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